Supreme Court, U.S.
FILED
MAY 24 1999
CLERK

(2)

No. 98-1758

In the Supreme Court of the United States

PARKWOOD DEVELOPMENTAL CENTER, INC. AND TEMPLETON SCHOOL OF SPECIAL EDUCATION, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1996

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

1998

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that a union's pre-election offer to waive initiation fees did not interfere with the certification election, since the offer was extended to all employees and was not conditioned upon any employee's pre-election support for the union.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	4
Conclusion	8
Appendix A	1a
Appendix B	4a

TABLE OF AUTHORITIES

Cases:

Amalgamated Clothing Workers v. *NLRB*, 345 F.2d 264 (2d Cir. 1965)	5
De Jana Indus., Inc., 305 N.L.R.B. 294 (1991)	7
Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966)	3
Molded Acoustical Prods., Inc. v. *NLRB*, 815 F.2d 934 (3d Cir.), cert. denied, 484 U.S. 925 (1987)	6
NLRB v. *Savair Mfg. Co.*, 414 U.S. 270 (1973)	2, 5, 7
NLRB v. *Semco Printing Ctr., Inc.*, 721 F.2d 886 (2d Cir. 1983)	6
NLRB v. *VSA, Inc.*, 24 F.3d 588 (4th Cir.), cert. denied, 513 U.S. 1041 (1994)	6
NLRB v. *Wabash Transformer Corp.*, 509 F.2d 647 (8th Cir.), cert. denied, 423 U.S. 827 (1975)	6
NLRB v. *Whitney Museum of Am. Art*, 636 F.2d 19 (2d Cir. 1980)	6
Warner Press, Inc. v. *NLRB*, 525 F.2d 190 (7th Cir. 1975), cert. denied, 424 U.S. 943 (1976)	6

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 8(a)(1), 29 U.S.C. 158(a)(1)	4
§ 8(a)(5), 29 U.S.C. 158(a)(5)	4

In the Supreme Court of the United States

No. 98-1758

PARKWOOD DEVELOPMENTAL CENTER, INC. AND TEMPLETON SCHOOL OF SPECIAL EDUCATION, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1996

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 165 F.3d 41 (Table). The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 4a-13a) is reported at 325 N.L.R.B. No. 89. The Board's underlying decision and certification of representative (App., *infra*, 1a-3a), and the hearing officer's report on petitioners' objections to the certification election (App., *infra*, 4a-9a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1998. A petition for rehearing was denied on February 4, 1999 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on May 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners operate an intermediate care facility for mentally retarded persons and a special education institute in Valdosta, Georgia. Pet. App. 5a. Petitioners are joint employers of approximately 173 employees. *Id.* at 6a; App., *infra*, 4a-5a. On January 31, 1997, United Food and Commercial Workers Union, Local 1996, AFL-CIO, filed a petition with the National Labor Relations Board for a representation election in a unit consisting of all of petitioners' employees. *Id.* at 4a. On April 10, 1997, pursuant to a stipulated election agreement, the Board conducted a secret-ballot election among the unit employees, which the union won by a vote of 97 to 40, with three challenged ballots. *Id.* at 4a-5a.

Petitioners filed objections to the election with the Board. One objection alleged that the union had "provided some employees eligible to vote in the election with a limited waiver of initiation fees," contrary to *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). App., *infra*, 6a. After an evidentiary hearing, the hearing officer issued a report recommending that petitioners' objection be overruled. *Id.* at 9a. The hearing officer found that, on April 6, 1997, the union had mailed a certificate to all 173 unit employees at the addresses that appeared on the voter-eligibility, or

"*Excelsior* list" compiled by petitioners. *Id.* at 7a.[1] The union's certificate stated, in pertinent part: "This is to certify that the bearer, whose name appears on the front of this certificate, shall not be required to pay initiation fees of any kind, nor any fees other than the regular monthly dues, which shall not be required of the bearer until a union agreement has been signed by the employer after it has been voted upon by employees of the bargaining unit and accepted by a majority vote." *Id.* at 7a. The hearing officer also found that nine of the 173 certificates were returned by the U.S. Postal Service as "undeliverable." *Ibid.*

The hearing officer explained that, under *Savair*, a union may not waive employees' initiation fees if the waiver is "conditioned upon the signing of a union authorization card prior to election," but the union may waive employees' initiation fees "if the waiver was extended to those who join the union after the election as well as before." App., *infra*, 8a. She found it "clear from the evidence that the [union's] certificate did not require that employees give pre-election support to the Union in exchange for a waiver of initiation fees." *Ibid.*[2] The hearing officer further explained that, while nine of

---

[1] Pursuant to *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), the employer is required prior to an election to provide the Board with the names and addresses of all eligible voters. The Board then provides this list, commonly referred to as the "*Excelsior* list," to the other parties to the election.

[2] Indeed, the hearing officer noted petitioners' concession that the union's certificate "does not condition waiver of fees upon pre-election support for the Union." App., *infra*, 8a. Rather, petitioners "attempt[ ] to expand *Savair* to make the certificate's assignation to a specific bearer an unlawful condition," an argument which the hearing officer concluded had "no support in *Savair*." *Ibid.*

the 173 certificates were returned by the U.S. Postal Service as "undeliverable," *id.* at 7a, petitioners "cannot expect to benefit from [their] own provision of erroneous mailing addresses" to the union. *Id.* at 8a n.15.

Petitioners filed exceptions to the hearing officer's recommendation, but the Board adopted the hearing officer's disposition of petitioners' objection to the election and certified the union as the employees' exclusive bargaining representative. App., *infra*, 1a-3a. When petitioners subsequently refused to bargain, the union filed an unfair labor practice charge. The Board's General Counsel issued a complaint alleging that petitioners' refusal violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5) and (1). Finding that all issues relevant to the unfair labor practice complaint were, or could have been, litigated in the representation proceeding, the Board, on summary judgment, concluded that petitioners had violated the Act as alleged, and ordered them to bargain upon request with the union. Pet. App. 4a-13a.

2. The court of appeals enforced the Board's order in an unpublished decision. Pet. App. 1a-3a. The court concluded that "substantial evidence supports the Board's decisions to overrule [petitioners'] election objections and certify the Union as the bargaining representative for its workers." *Id.* at 3a. The court found petitioners' contention that the union's waiver of initiation fees violated *Savair* to be "meritless." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 7-10) that the decision below conflicts with *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). In *Savair*, a union had, prior to a representation election, announced a selective waiver of its initiation fee only for employees who signed union recognition slips before the election. Employees who did not sign such slips would not get the benefit of the fee waiver, and some employees were under the impression that they would have to pay a "fine" if the union were certified but they had failed to sign the slips. *Id.* at 272-273. The Court held that the union's selective waiver of its initiation fee impermissibly interfered with employee free choice to vote for or against union representation in two ways. First, the union was able to "buy endorsements" and thus "paint a false portrait of employee support during its election campaign" by using this false showing of strength as a "campaign tool" in seeking additional employee support. *Id.* at 277. Second, at least some employees might have felt obligated, when they subsequently voted in the election, "to carry through on their stated intention to support the union." *Id.* at 278.

The Court also recognized, however, that a union has a legitimate interest in waiving its initiation fee for new members, when the waiver is "available not only to those who have signed up with the union before an election but also to those who join after the election." 414 U.S. at 274 n.4. As the Court pointed out, employees may be reluctant to pay money to a union before the union shows that it can do anything for them; a waiver of initiation fees "remove[s] this artificial obstacle to [employees'] endorsement of the union." *Ibid.* (quoting *Amalgamated Clothing Workers* v. *NLRB*, 345 F.2d 264, 268 (2d Cir. 1965)). "[A] union's promise of temporary waiver of dues for all potential

union members may serve to counteract an oft-used management argument that unions require workers to pay dues without guaranteeing the receipt of any tangible benefits." *NLRB* v. *Wabash Transformer Corp.*, 509 F.2d 647, 649 (8th Cir.), cert. denied, 423 U.S. 827 (1975). Accordingly, since *Savair*, the Board and the courts of appeals have consistently held that offers to waive fees extended to all employees currently in the work force, regardless of whether they join the union before or after the election, do not interfere with employee free choice in representation elections and therefore are not improper inducements under *Savair*.[3]

2. Petitioners do not take issue with the principle that a union's offer to waive initiation fees that extends to all employees in the bargaining unit is permissible under *Savair*. Rather, petitioners contend (Pet. 9) that the union's waiver of initiation fees was improper because nine of the 173 unit employees did not actually receive the certificates mailed to them by the union. There is no merit to that contention.

Contrary to petitioners' suggestion, the propriety of the union's fee waiver does not turn on whether each and every unit employee actually received a certificate from the union memorializing the offer. Rather, the issue is whether the fee waiver was available to all employees and was not conditioned on pre-election support for the union. See *NLRB* v. *Semco Printing Ctr., Inc.*, 721 F.2d 886, 889 (2d Cir. 1983) (fee waiver

---

[3] See, *e.g.*, *NLRB* v. *VSA, Inc.*, 24 F.3d 588, 594 (4th Cir.), cert. denied, 513 U.S. 1041 (1994); *NLRB* v. *Whitney Museum of Am. Art*, 636 F.2d 19, 21 (2d Cir. 1980); *Molded Acoustical Prods., Inc.* v. *NLRB*, 815 F.2d 934, 937 (3d Cir.), cert. denied, 484 U.S. 925 (1987); *Warner Press, Inc.* v. *NLRB*, 525 F.2d 190, 196-197 (7th Cir. 1975), cert. denied, 424 U.S. 943 (1976).

proper where availability was not limited "only to those who attended the meetings" at which union informed employees of the offer); *De Jana Indus., Inc.*, 305 N.L.R.B. 294, 294 & n.5 (1991) (fee waiver proper where no employee was "effectively exclude[d] * * * from participation in the offer"). Here, although the certificates of nine employees were returned by the U.S. Postal Service as "undeliverable," nothing in the record suggests that the union, on account of that circumstance, would have declined to honor the fee waiver as to those employees. Accordingly, the Board reasonably concluded that the union's fee waiver was proper under *Savair*.

Petitioners also contend (Pet. 9-10) that "Parkwood was not required to insure 100% accuracy" of the addresses on the *Excelsior* list and, therefore, that "it was at the Union's risk to mail the certificates to the employees' addresses as shown on the *Excelsior* list." Petitioners' argument, however, misses the point. The issue here is not whether the union bore the "risk" identified by petitioners. Rather, the question is whether the fee waiver was available to all unit employees, and the Board reasonably answered that question in the affirmative.[4] Particularly in view of the union's wide margin of victory in the election (97 to 40), the Board acted within its discretion in overruling petitioners' objection to the election. See App., *infra*, 9a n.19; cf. *Savair*, 414 U.S. at 278 (noting that "the change of just one vote" would have resulted in a tie).

---

[4] Moreover, as the hearing officer noted (App., *infra*, 8a n.15), to conclude that the union's otherwise proper fee waiver was invalid merely because a few employees did not actually receive certificates would permit petitioners "to benefit from [their] own provision of erroneous mailing addresses" to the union.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board

MAY 1999

APPENDIX A

GFH
Valdosta, GA

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Case 12-RC-8055

PARKWOOD DEVELOPMENTAL CENTER, INC.
AND TEMPLETON SCHOOL OF SPECIAL EDUCATION,
INC., AS JOINT EMPLOYERS, EMPLOYER

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 1996,
AFL-CIO, CLC, PETITIONER

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has considered objections to an election held April 10, 1997, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 97 for and 40 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's

findings[1] and recommendations,[2] and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the ballots have been cast for United Food and Commercial Workers Union, Local 1996, AFL-CIO, CLC, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees of the Employer including custodians, housekeeping aides, unit housekeepers, laundry employees, maintenance employees, car/bus drivers, horticulturists, cooks, assistant cooks, dietary aides, dietary AM/PM janitors, social work technicians, direct care staff employees, direct care team leaders, medication nurses, treatment nurses, infection control nurses, physical health records nurses, transportation and appointment specialists, behavior program aides, activities center staff, behavior program aide/data specialists, transportation aides, sensorimotor therapists, and teacher aides, but not including receptionist, secretary to the administrator, purchasing coordinator, accounting/bookkeeper, clerical assistant for Templeton School, QMR records audi-

---

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations overruling Employer Objections 2-4 and 7.

tor, clinical records staff, computer data and program specialist, computer specialist and assistant to Personnel Director, professional employees, managerial employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., November 7, 1997.

William B. Gould IV, Chairman

Sarah M. Fox, Member

John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX B

[Excerpts from Hearing Officer's Report]

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION TEN

Case 12-RC-8055

PARKWOOD DEVELOPMENTAL CENTER, INC.
AND TEMPLETON SCHOOL OF SPECIAL EDUCATION,
INC., AS JOINT EMPLOYERS, EMPLOYER

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1996,
AFL-CIO, CLC, PETITIONER

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

The petition in the above-referenced proceeding was filed January 31, 1997. Pursuant to Stipulated Election Agreement approved on February 25, 1997, an election by secret ballot was conducted on April 10, 1997, among the employees of Parkwood Developmental Center, Inc. and Templeton School of Special Education, Inc., as Joint Employers (hereafter referred to as the Employer)[1] in the stipulated appropriate unit to determine

---

[1] All full-time and regular part-time employees of the Employer including custodians, housekeeping aides, unit housekeepers, laundry employees, maintenance employees, car/bus

the question concerning representation. Upon conclusion of the balloting, the parties were furnished a tally of ballots which showed that of approximately 173 eligible voters, 97 cast valid votes for the Petitioner, 40 cast valid votes against the Petitioner, and 3 cast challenged ballots. The challenged ballots were insufficient in number to affect the outcome of the election. On April 17, 1997, the Employer filed timely objections to the election and a copy thereof was duly served upon the Petitioner.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the issues raised by the Employer's Objections was conducted, and thereafter, on May 2, 1997, the Regional Director of Region 12 issued and served on the parties an Order Directing Hearing on Objections and Notice of Hearing which directed that a hearing be held for the purpose of receiving evidence to resolve the issues raised by the Employer's Objections. Pursuant to the Regional Director's Order, a hearing was held on May 15, 1997 at Valdosta, Georgia, and continued on May 29, 1997 at

---

drivers, horticulturists, cooks, assistant cooks, dietary aides, dietary AM/PM janitors, social work technicians, direct care staff employees, direct care team leaders, medication nurses, treatment nurses, infection control nurses, physical health records nurses, transportation and appointment specialists, behavior program aides, activities center staff, behavior program aide/data specialists, transportation aides, sensorimotor therapists, and teacher aides, but not including receptionist, secretary to the administrator, purchasing coordinator, accounting/bookkeeper, clerical assistant for Templeton School, QMR records auditor, clinical records staff, computer data and program specialist, computer specialist and assistant to Personnel Director, professional employees, managerial employees, guards and supervisors as defined in the Act.

Atlanta, Georgia, before the undersigned hearing officer, duly designated for that purpose. The Employer and the Petitioner appeared and participated. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the conclusion of the hearing and on the record, the parties were permitted to file briefs, which were considered. Upon the entire record of the case and from my observations of the witnesses,[2] and after examination of all exhibits, I make the following findings and recommendations to the Board.

* * * * *

OBJECTION 6

Union representatives and agents provided some employees eligible to vote in the election with a limited waiver of initiation fees and dues payments in violation of the standards adopted in Savair Manufacturing Corp., 94 S. Ct. 495 (1973).

---

[2] In evaluating the credibility of the witnesses, I have considered their general demeanor, closely observed while testifying under oath, partisan interests, guarded or indirect answers, conclusory and conflicting testimony as distinguished from fact, self-serving answers, leading questions by Counsel, general attitude, memory for detail, and ability to comprehend the nature of the questions and answers thereto. Other criteria bearing on credibility may from time to time be discussed with respect to particular witnesses. However, where unnecessary, I shall not allude to testimony I deem incredible.

In support of this objection, the Employer presented evidence that the Union mailed to employees certificates entitling the bearer to a waiver of initiation fees.

The front of the card read, in pertinent part: "No Initiation Fee Required. This certificate is valuable to you DON'T LOSE IT!" The back of the card read, in pertinent part: "This is to certify that the bearer, whose name appears on the front of this certificate, shall not be required to pay initiation fees of any kind, nor any fees other than the regular monthly dues, which shall not be required of the bearer until a union agreement has been signed by the employer after it has been voted upon by employees of the bargaining unit and accepted by a majority vote." and "This certificate will be recognized as valid only if presented to the union not later than thirty (30) days after the union agreement is in effect with present employer." On April 6, the Union mailed these cards to all employees listed on the *Excelsior* list.[14] The United States Postal Service returned nine of the cards as undeliverable.

---

* * * * *

[14] The Employer's brief asserts that the "Petitioner, itself, stipulated that it did not mail the Certificate to all eligible voters, it only mailed the Certificate to an "overwhelming majority" of the employees in the bargaining unit. (Tr. 227)." In fact, Petitioner's counsel offered to stipulate that the Petitioner mailed waivers to the overwhelming majority of the employees of the bargaining unit. Petitioner's witness Robert Ellis testified immediately thereafter that "[the Petitioner] mailed them to the entire excelsior [sic] list that was considered as eligible employees to vote." The stipulation offered by the Petitioner's counsel was never entered.

The Employer argues first that the waiver was actually a gift certificate analogous to a five-dollar gift certificate to buy turkeys and, therefore, a prohibited benefit. Though the Employer cites numerous cases which hold that a Union may not distribute gifts during the critical period, it cites none that suggest that a waiver of initiation fees constitutes a gift, rather than a waiver of initiation fees.

In the alternative, the Employer argues that the certificate was an unlawful waiver of initiation fees. In *NLRB v. Savair Manufacturing Company*, 414 U.S. 270 (1973), the Supreme Court held that a waiver of initiation fees conditioned upon the signing of a union authorization card prior to election is improper and will result in setting aside an election. However, in reaching this finding, the Court specifically found lawful a waiver of such fees if the waiver was extended to those who join the union after the election as well as before. *See* 414 U.S. at 272 n. 4. While admitting that the Petitioner's certificate does not condition waiver of fees upon pre-election support for the Union, the Employer attempts to expand *Savair* to make the certificate's assignation to a specific bearer an unlawful condition. There is no support in *Savair* or other cases the Employer cited for such an interpretation. It is clear from the evidence that the Petitioner's certificate did not require that employees give pre-election support to the Union in exchange for a waiver of initiation fees. Moreover, the waiver was sent to all eligible employees at the addresses provided to the Petitioner by the Employer itself.[15]

---

[15] The Employer cannot expect to benefit from its own provision of erroneous mailing addresses. In any case, *Savair* does

* * * * *

RECOMMENDATIONS

Having fully considered all of the allegations both separately and cumulatively,[19] I find that Employer's Objections raise no material or substantial issues affecting the results of the election and hereby recommend that they be overruled.[20] As the Petitioner has received a majority of valid votes cast in the election, I further recommend that a Certification of Representative be issued.

Dated at Atlanta, Georgia, this 2nd day of September, 1997.

/s/ LISA Y. HENDERSON
LISA Y. HENDERSON
Hearing Officer
National Labor Relations Board
101 Marietta Tower, Suite 2400
101 Marietta Street, N.W.
Atlanta, Georgia 30323-3301

---

not require that initiation fees be waived from all employees. *See, e.g. Twilight Haven, Inc.*, 235 NLRB 1337, 1345 (1978).

[19] While not essential to my conclusions, I also note that the vote herein was not close.

[20] Pursuant to Section 102.69 of the Board's Rules and Regulations, any party, within 10 days from the date of issuance of this report, may file with the Board in Washington, D.C. eight (8) copies of exceptions hereto. Immediately upon filing such exceptions, the party filing same shall serve a copy thereof on the other party and shall file a copy with the Regional Director. If no exceptions are filed hereto, the Board will adopt these recommendations.